

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

FRANCISCO JAVIER TORRES-VILLA,

Defendant.

CR 08-0255-TUC-FRZ (GEE)

**REPORT AND RECOMMENDATION**

The District Court referred this case to the magistrate for hearing on pretrial matters. Hearing on the defendant's Motion to Suppress was held on June 26, 2008. Upon consideration of the evidence presented and the arguments of respective counsel, the magistrate recommends the District Court, after its de novo review, deny the Motion to Suppress.

**CHARGE:**

The one-count indictment charges that on February 5, 2008, near Wilcox, the defendant possessed approximately 106.87 kilograms of marijuana with the intent to distribute.

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1 **MOTION TO SUPPRESS:**

2 Defendant argues all evidence against him must be suppressed because the  
3 Border Patrol agent lacked reasonable suspicion to stop his vehicle.

4 ***Testimony of David Mathie***

5 Mathie has been employed as a U.S. Border Patrol agent for the past four and a  
6 half years. On February 5, 2008, at about 2:20 p.m. he was on duty and decided to make an  
7 investigatory stop of a vehicle driven by the defendant. Mathie was in his service vehicle  
8 on the westside of Highway 191 between the towns of Elfrida and McNeal, about 20-25  
9 miles north of the Mexican border. Highway 191 is a two-lane paved highway which runs  
10 almost directly north from Douglas up to I-10. There is a port of entry in Douglas. Mathie  
11 testified the population of Douglas is approximately 30,000, and other than McNeal there  
12 were no towns south of his location other than Douglas. He also testified Hwy. 191 is a  
13 "very commonly used route for illegal aliens" and recently, in fact, there had been  
14 intelligence reports of an increase in such activity. The route is also used for narcotics  
15 smuggling.

16 Mathie stated he was observing passing traffic and did not have his emergency  
17 lights on. As the defendant's vehicle approached from the south Mathie noticed that both  
18 the driver and passenger were sitting very straight and rigid, and the driver had his arms  
19 "locked out straight in front of him" holding the steering wheel. He testified that normal  
20 traffic through the area is "a lot of local people, farmers and ranchers that live there....[and]  
21 as they drive by, they usually wave at us....Most people look at us at least kind of  
22 acknowledge our presence...." The defendant's vehicle was traveling "pretty close to the  
23 speed limit." It was an older model SUV with heavily tinted windows in the back and in the  
24 two rear side windows. It had Arizona license plates.

25 Mathie decided to pull out and take a "little bit closer look at the vehicle." He  
26 did not turn on his emergency lights, but caught up to the vehicle and followed about two car  
27 lengths behind it. From the suspect's side view mirror, Mathie noticed the driver was  
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1 "continually watching us in it, "almost like as if he was more concerned about what we were  
2 doing than him actually driving up the road." Mathie said this was unusual and indicated the  
3 driver was "stressed out" by the presence of law enforcement. He also testified the  
4 defendant, while watching in his side view mirror "drift[ed] a little bit over the center  
5 dividing line...just a couple times."

6 Mathie did a registration check and discovered the vehicle was from Nogales.  
7 He testified, "[W]e usually don't ever see vehicles from there." He stated that to get to  
8 Nogales from where he first noticed the defendant one would have to continue north on Hwy.  
9 191 up to I-10, proceed west to Tucson, and then take I-19 south to Nogales. If one were  
10 traveling from Douglas the most direct route to Nogales would be to take Hwy. 80 (which  
11 goes northwesterly from Douglas) through Tombstone, and then pickup Hwy. 82 (which goes  
12 west and then south to Nogales). He stated there is no direct route to Nogales from where  
13 he first observed the defendant. Traveling north from his location on Hwy. 91 to I-10 there  
14 are several small towns.

15 Mathie decided to stop the vehicle, and when he activated his lights and siren the  
16 defendant immediately pulled over.

17 On cross-examination Mathie testified Hwy.191 is a public state highway and is  
18 not an isolated road. He admitted there were other roads that one could take from his  
19 location to get to Nogales other than the ones he described on direct examination. He also  
20 admitted that before stopping the defendant he had no information the defendant was in fact  
21 traveling from Douglas or that he had crossed from Mexico at Douglas. South of his location  
22 was located a Department of Corrections prison near Double Adobe Road. North of his  
23 location was Chiricahua Monument, an unrestricted tourist attraction, open to people from  
24 anywhere. Mathie testified the defendant did not speed up or take any evasive action as it  
25 passed his location. He admitted there was another Border Patrol vehicle stopped alongside  
26 him when he first noticed the defendant, and they both pulled out to take a further look at the  
27 suspect vehicle. After he first pulled out he had to accelerate in order to catch up to the  
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1 defendant. In about 30-60 seconds he caught up to the defendant who then slowed down to  
2 the exact posted speed limit. He first saw the defendant at milepost 24, and the stop occurred  
3 at milepost 28. The defendant's vehicle did not appear to be heavily laden. Mathie testified  
4 it was not unusual to find vehicles with dark tinted windows in Arizona.

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6 **DISCUSSION;**

7           The defendant argues that Mathie lacked reasonable suspicion to justify the stop  
8 of his vehicle.

9           The search and seizure of a motorist suspected of criminal activity is analyzed  
10 according to the framework set out in *Terry v. Ohio*, 392 U.S. 1 (1968). For a lawful  
11 investigative stop the officer must have a "reasonable suspicion supported by articulable facts  
12 that criminal activity 'may be afoot'." *United States v. Sokolow*, 490 U.S. 1,7 (1989). In  
13 determining whether reasonable suspicion existed to justify an investigatory stop, a reviewing  
14 court is required to "look at the totality of the circumstances of each case to see whether the  
15 detaining officer ha[d] a particularized and objective basis for suspecting legal wrongdoing."  
16 *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (internal punctuation deleted). "In the  
17 context of Border Patrol [stops], the factors to be considered in determining whether  
18 'reasonable suspicion' exists to justify stopping a vehicle include, but are not limited to: (1)  
19 characteristics of the area; (2) proximity to the border; (3) usual patterns of traffic and time  
20 of day; (4) previous alien or drug smuggling in the area; (5) behavior of the driver...; (6)  
21 appearance or behavior of passengers; (7) model and appearance of the vehicle; and (8)  
22 officer experience. *United States v. Garcia-Barron*, 116 F.3d 1305, 1307 (9<sup>th</sup> Cir. 1997)  
23 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975)).

24           In the present case Mathie listed the following factors as supporting his decision  
25 to conduct an investigatory stop of the defendant: (1) he first noticed the defendant's vehicle  
26 20-25 miles north of the Mexican border; (2) Hwy. 191 is known to be used for alien and  
27 drug smuggling and recent intelligence information advised those activities had increased;  
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1 (3) the driver and passenger were sitting in a straight and rigid manner ; (4) neither the driver  
2 or passenger looked toward Mathie as they approached and passed his location; (5) the  
3 defendant was driving a older model SUV; (6) the back and rear side windows were heavily  
4 tinted; (7) the vehicle was registered from Nogales and that was unusual for the area; (8) after  
5 Mathie and the other BPA vehicle got behind the defendant's vehicle the driver spent a lot  
6 of time checking his side view mirror such that he crossed over the center line several times;  
7 and (9) the defendant slowed down to the exact posted speed limit after the two BPA vehicles  
8 began to follow him.

9 In deciding whether the totality of the circumstances constitute a reasonable  
10 suspicion, it is inappropriate to view each factor in isolation and to give no weight to factors  
11 for which an innocent explanation may exist. *United States v. Arvizu*, 534 U.S. 266, 274  
12 (2002). Individual factors that may appear innocent in isolation may constitute suspicious  
13 behavior when aggregated together. While no particular factor is controlling, and the totality  
14 of the circumstances governs, the one vital element is that the agent must have had reason  
15 to believe the suspect vehicle had come from the border. Mathie first noticed the  
16 defendant's vehicle about 20-25 miles north of the Mexican border and although Mathie  
17 admitted he had no specific information the vehicle had, in fact, come from the border, this  
18 court believes that considering his testimony regarding the area south of the stop location  
19 Mathie could have reasonably concluded the vehicle came either from the border itself or  
20 from an area fairly close to it.

21 Considering the factors listed by Mathie and analyzing them in the context of the  
22 "totality of the circumstances", this court concludes Border Patrol Mathie had reasonable  
23 suspicion to conduct an investigative stop of the defendant's vehicle.

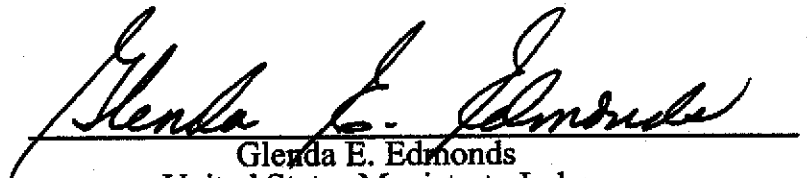
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25 **RECOMMENDATION:**

26 In view of the foregoing, the magistrate recommends that the District Court, after  
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1 its independent review of the record, **DENY** the defendant's Motion to Suppress. Any party  
2 may file objections within 10 days after being served with a copy of this Report and  
3 Recommendation. If objections are not timely filed, the party's right to de novo review may  
4 be waived. If objections are filed, the parties should direct them to the District Court by  
5 **omitting the magistrate's initials from the caption.**

6 This Report and Recommendation is being faxed to all counsel on today's date.  
7 The Clerk of the Court is directed to send a copy of this Report and Recommendation to all  
8 counsel.

9 DATED this 26<sup>th</sup> day of September, 2008.

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13 Glenda E. Edmonds  
United States Magistrate Judge  
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